United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

Original - Affidavit of Mailing

74-1186

To be argued by
STEVEN KIMELMAN

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 74-1186

UNITED STATES OF AMERICA,

Appellee,

—against—

HUMBERTO FLORES,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE APPELLEE

EDWARD JOHN BOYD, V,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
STEVEN KIMELMAN,
Assistant United States Attorneys,
Of Counsel.

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United States Court of Appeals

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UNITED STATES OF AMERICA,

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—against—

HUMBERTO FLORES,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Humberto Flores appeals from a judgment of the United States District Court for the Eastern District of New York (Costantino, *J.*), entered on February 8, 1974, convicting him of importing 2.2 kilograms of cocaine into the United States in violation of Title 21, United States Code, Sections 952(a) and 960(a)(1); and conspiracy to import cocaine, in violation of Title 21, United States Code, Sections 952 (a) and 963. Appellant was sentenced to eight years imprisonment on each count, the sentences to run concurrently and to a special parole term of five years. Appellant is presently incarcerated.

On this appeal appellant only challenges the District Court's refusal to dismiss the indictment pursuant to Rule 4 of the Plan for the United States District Court for the Eastern District of New York for Achieving Prompt Disposition of Criminal Cases (the "Plan"). Appellant con-

tends that the lapse of nine months and twenty-five days between his initial arrest and the date of the Government's filing of its Notice of Readiness constituted a per se violation of the Plan and that, therefore, the indictment should have been dismissed with prejudice prior to the start of appellant's trial. The Government contends that the first seven months of the delay was excludable because the only witness who could link appellant with the substantive crime he committed had consistently refused to testify out of fear of appellant. Appellant does not challenge the sufficiency of the evidence.

Statement of the Case

On February 25, 1972, one Franklin Loqui-Chang was arrested in Miami, Florida, for smuggling 2.8 kilograms of cocaine. Subsequent investigation by Special Agent John Daniocek of the Customs Agency Service, including an interview of Loqui-Chang in late May, 1972, while he was incarcerated, showed that appellant had been involved with Loqui-Chang in smuggling drugs into the country.* Thereafter, in June, Daniocek advised Assistant United States Attorney Robert L. Clarey of the investigation's progress. Though Clarey memorialized Loqui-Chang's testimony in the grand jury that July, he nevertheless did not seek an indictment but, instead, directed Daniocek to gather additional evidence against appellant. As stated by Clarey in his affidavit in the District Court, he believed, at that time, that "while the case was potentially proscutable there was insufficient evidence on which to base an indictment." (See Affidavits of Robert L. Clarey and John Daniocek, Appellant's Appendix, D and E).

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* Following his arrest, Loqui-Chang was indicted and convicted in the Southern District of Florida, upon his plea of guilty, of importing cocaine and sentenced to nine years imprisonment, subsequently reduced to three years in consideration of his cooperation in the instant case against appellant (see Letter of Robert A. Morse, July 27, 1973, Appellant's Appendix, I).

On September 28, 1973, some two and a half months later, a Cuban exile, Raimundo Canas (initially identified as "Rolando Sanchez"), was arrested at the International Arrivals Building at John F. Kennedy International Airport, having just arrived from Santiago, Chile. He had with him about two kilograms of cocaine. Following his arrest, Canas informed the agents that his "contact" would be waiting for him in the lobby of the Arrivals Building. Accordingly, Canas was permitted to enter the lobby, unescorted by the agents. When Canas entered the lobby, appellant appeared to recognize Canas. However, appellant and a companion, Fernando Montane, also noticed the surveilling agents and attempted to leave the lobby. They were arrested in the course of that attempt. (See, Complaint of John E. Daniocek, Appellant's Appendix, p. 2a; see also, Trial Transcript, pp. 38-45).

The next day, September 29th, all three defendants were arraigned before the Magistrate. Appellants' bail was set at $150,000. He was unable to post that amount and was incarcerated. The Magistrate set October 10th as the date for the preliminary hearing.

On that same day, September 29, Canas was interviewed by Agent Daniocek. Though Canas fully implicated appellant, he nevertheless refused to testify against him. Thereafter, Canas, alone, was indicted on three counts (72 Cr. 1152). The decision not to indict appellant and Montane was reached, after consultation with Edward J. Boyd V, the Chief of the Criminal Division. It was determined that, because Canas would not testify in the grand jury, the evidence was not sufficient to indict either appellant or his companion, Montane. Accordingly, on October 10th, the bail requirements on appellant and Montane were reduced sufficiently to allow their release.* (Clarey Affidavit, Appellant's Appendix, D).

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* The Government consented to reduce the bail on each. Appellant was released after signing a $20,000 personal recognizance bond.

On January 3, 1973, following his plea of guilty to one count in the indictment, Canas was sentenced to a prison term of eight years by District Judge Zavatt. At that time, Canas was again asked by Agent Daniocek if he would testify against appellant. Once more, Canas declined, stating that he feared endangering his family (Daniocek Affidavit, Appellant's Appendix, E).

By February, it became apparent to Clarey that, without Canas' testimony, no prosecution could be maintained against appellant. Thus, on February 23, 1973, some five months following appellant's arrest, Clarey effected a dismissal of the complaint before the Magistrate * (Clarey Affidavit, Appellant's Appendix, D).

Twice in April, Daniocek attmepted to persuade Canas to testify. Canas, however, continued his refusal (Daniocek Affidavit, Appellant's Appendix, E). Nevertheless, in May, Canas decided to fully cooperate with the Government. Thereafter, he testified before the grand jury. In turn, that grand jury returned the instant indictment against appellant and two others, Carlos Hidalgo and Miguel Vera.

The indictment against appellant was filed on June 19, 1973, less than two months following Canas' decision to testify. Though appellant was arrested nine days later, his co-defendants remained as fugitives. The Government, thereafter, filed its Notice of Readiness on July 25th.

Prior to trial appellant moved to dismiss the indictment against him pursuant to Rule 4 of the Plan. Affidavits were filed by the Government and a hearing was held before Judge Costantino on October 12, 1973 (See, Minutes of October 12, 1973, Appellee's Appendix, 3a-9a). No testimony was taken at this hearing, but oral arguments were made on the basis of affidavits previously submitted. On

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* The complaint against Montane was also dismissed on February 23, 1973. He was never indicted.

October 15, 1973, Judge Costantino denied appellant's motion on the grounds that under Rule 4 of the Plan, the Government had six months from June 19, 1973, the date of the indictment, to file its Notice of Readiness. The District Court held that because the original complaint had been dismissed, the time under Rule 4 would not be computed from the date of the complaint, September 29, 1973 or the date of the arrest, September 28 (See, Memorandum and Order of the District Court, Appellant's Appendix, F).

ARGUMENT

The District Court properly denied appellant's motion to dismiss the indictment for delay.

Appellant contends that the almost ten month delay between his arrest and the filing of the Government's Notice of Readiness was a violation of the six month readiness requirement in the Eastern District's Rule 50(b) Plan for Achieving Prompt Disposition of Criminal Cases (the "Plan"). Recognizing that for the first seven of those months the Government was unable to try him without the cooperation of the witness Canas, much less indict him, appellant nonetheless urges that the Government was bound, under the Plan, to somehow compel Canas' testimony. In effect, appellant argues that one of the purposes of the Plan is to place prudent and careful prosecutions in almost certain jeopardy by requiring the Government to proceed to trial with hostile witnesses upon pain of dismissal. The contention, of course, is without merit.

Rule 4 of the Plan provides, in relevant part, as follows: "In all cases, the Government must be ready for trial within the six months from the date of the arrest, service of summons, detention or the filing of a complaint or a formal charge upon which the defendant is to be tried (other than sealed indictments), whichever is earliest." The purpose of Rule 4 in the Plan and its analogue in Rule 4 of the Second

Circuit Rules Regarding Prompt Disposition of Criminal Cases ("the Rules"), is straightforward. In *Hilbert* v. *Dooling,* 476 F.2d 355, 357 (2d Cir.), *cert. denied,* 414 U.S. 878 (1973), Judge Mansfield expressed that purpose as follows:

> The purpose of Rule 4 is to insure that regardless whether a defendant has been prejudiced in a given case or his constitutional rights have been infringed, the trial of the charge against him will go forward promptly instead of being frustrated by creeping, paralytic procedural delays of the type that have spawned a backlog of thousands of cases, with the public losing confidence in the Courts and gaining the impression that federal criminal laws cannot be enforced.

The above quote from *Hilbert* reiterated a similar expression from this Court's Circuit Council in its statement to accompanying the Rules:

> The public interest requires disposition of criminal charges with all reasonable dispatch. The deterrence of crime by prompt prosecution of charges is frustrated whenever there is a delay in the disposition of a case which is not required for some good reason. The general observance of law rests largely upon a respect for the process of law enforcement. When the process is slowed down by repeated delays in the disposition of charges for which there is no good reason, public confidence is seriously eroded.

See also, *United States* v. *Lasker,* 481 F.2d 229, 233 (2d Cir. 1973); *United States* v. *Pierro,* 478 F.2d 386, 389 (2d Cir. 1973).

It is apparent, therefore, that the Rules and thereafter, the Plan, were promulgated primarily to maintain public confidence in the judicial process by achieving a prompt

disposition of pending criminal matters and thereby avoiding a backlog in the courts. The Second Circuit Council found that unwarranted prosecutorial delay in trying pending cases was responsible in part for creating backlogs. The Rules therefore required, with certain exceptions, that the Government be ready for the trial of pending matters within six months of the date that a charge became a matter of public record. Rule 4 of the Plan carries forward that requirement as well as continuing, in Rule 5, those exceptions which will relieve the Government of its obligation to be ready.*

The facts of the instant appeal warrant a conclusion by this Court that the time during which Canas would not testify, more than seven months, was an excludable period under Rule 5(c)(i) and (h) of the Plan. Those Rules provide in conjunction with Rule 4, as follows:

> Rule 4.
>
> * * * * *
>
> If it should appear that sufficient grounds existed for tolling any portion of the six months period under one or more of the exceptions in Rule 5, the motion shall be denied, whether or not the government has previously requested a continuance.
>
> * * * * *
>
> Rule 5.
>
> Excluded periods. In computing the time within which the government should be ready for trial under

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* Though this Circuit's Rules were never repealed in *haec verba*, the decisions in *Hilbert* v. *Dooling*, *supra*, and *United States* v. *Scafo*, 480 F.2d 1312, 1316, fn. 6 (2d Cir. 1973), *cert. denied*, — U.S. —, 94 S. Ct. 378 (1973), clearly indicate that the Rule 50 (b) plans supersede the Prompt Disposition Rules. Despite the fact that the date on which the Plan became effective, April 1, 1973, followed by six months the date of his arrest, appellant does not urge that the Rules govern the decision herein and appears to assume the applicability of the Plan's provisions. The Government agrees with that assumption.

Rules 3 and 4, the following periods should be excluded:

* * * * *

(c) The period of time during which:

(i) evidence material to the government's case is unavailable, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available within a reasonable period; . . .[*]

* * * * *

(h) Other period of delay occasioned by exceptional circumstances.*

Following appellant's arrest on Sepetmber 28, 1972, the Government was faced with an unusual problem: Its only witness to appellant's participation in this smuggling operation, Canas, refused to testify against appellant even though he freely gave complete details as to appellant's role in the crime. After five months of investigation and a further unsuccessful attempt to convince Canas to testify under oath, the United States Attorney's Office concluded that it could not, without other evidence, successfully prosecute

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* Under the prior Rules, this excludable period was prefaced by the language: "The period of delay resulting *from a continuance granted at the request of a prosecuting attorney*" (emphasis added). Under Rule 5(c) of the Rules, therefore, a request for a continuance, based upon an exception covered by Rule 5(c), had to be made, essentially, when the "unavailability of evidence" first became known to the prosecutor. See *United States* v. *Rollins*, 475 F.2d 1108, 1110 and fn. 2 (2d Cir. 1973). No such prior request requirement, however, is contained in the Plan which expressly provides, in Rule 4:

> ". . . If it should appear that sufficient grounds existed for tolling any portion of the six months period under one or more of the exceptions in Rule 5, the motion shall be denied, *whether or not the government has previously requested a continuance*" (emphasis added).

appellant, let alone seek in good faith an indictment. It, therefore, dismissed the complaint against appellant. When Canas finally did agree to testify, more than seven months after appellant's original arrest, the Government moved as expeditiously as possible to indict and file its Notice of Readiness.*

The Government's dilemma in this case was similar to the difficulties faced by the Government as outlined in the cases of *United States* v. *Rollins,* 487 F.2d 409 (2d Cir. 1973) and *United States* v. *Cuomo,* 479 F.2d 688 (2d Cir. 1973), *cert. denied, sub. nom. Rizzo* v. *United States,* — U.S. —, 94 S. Ct. 357 (1973).

In *Rollins,* the defendant moved to dismiss the indictment against him on the grounds that seven months after his arrest the Government had failed to indicate its readiness for trial. The Government replied that the delay was caused by "exceptional circumstances" covered under Rule 5(h) of the Second Circuit Rules.

The seven month delay in *Rollins* was caused by the Government's reluctance to have a major witness testify at trial. That witness, a Government agent, was himself under investigation and the Government believed that if he were to be prematurely called as a witness the investigation of the witness would be undermined. In *Rollins,* this Court agreed with the Government that exceptional circumstances existed for the delay in the Government's readiness. Justice Oakes stated as follows (487 F.2d at 413-414):

> The public interest in prompt disposition of criminal cases is the touchstone of the Rules. In determining whether facts present circumstances exceptional

* Although Canas apparently communicated to Assistant United States Attorney Clarey on May 4th that he was finally willing to testify, that cooperation was not confirmed until the latter part of May when Canas was brought to the United States Attorney's Office.

> enough to merit an extension of time, the public interest in prompt adjudication must be balanced against competing interests. Here the delay occasioned by the secret investigation of the officer/witness furthered the public interest in full investigation of police corruption, a serious problem in New York City. [Footnote omitted.] Had the case been brought to trial while the investigation was in process, and had the defense cross-examined the witness concerning his alleged misconduct, the investigation would have been frustrated. In such a situation we think the balance tips in favor of a finding of "exceptional circumstances" to bring this case within rule 5(h).[*]

In *United States* v. *Cuomo, supra,* the defense claimed the lower court had erred in granting the Government a 90 day continuance because a material witness was unavailable to testify. That continuance caused the Government to exceed the six month period provided in Rule 4 of the then applicable Rules. The lower court had granted the continuance because the Government had desired to keep secret the identity of its major witness who had participated in other pending investigations. This Court upheld the lower court's continuance as constituting "exceptional circumstances" under Rule 5(c)(ii) of the Second Circuit Rules. The Court remarked that the "prosecution was completely justified in requesting the continuance so that . . . [the witness] . . . could retain his secret status as an under-

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* Appellant's suggestion that Canas could have been forced to testify upon the threat of a contempt citation ignores the fact that Canas, who was already serving an eight year prison sentence, (i) was apparently not afraid of jail and (ii) had not testified out of fear of appellant. Moreover, appellant's reliance on *United States* v. *Sanchez,* 459 F.2d 100 (2d Cir. 1972), *cert. denied,* 409 U.S. 864 (1972) is ill-conceived. The case has nothing whatever to do with the readiness requirement of the Government nor the responsibility of the Government to prosecute cases that, at the very least, will not collapse in the hands of hostile witness.

cover agent until other pending investigations in which he was involved were completed" *United States* v. *Cuomo, supra,* at 694.

In the instant case, the Government faced an even more difficult situation than it faced in the *Rollins* and *Cuomo* cases. In *Rollins* and *Cuomo,* the witnesses were at least willing to testify. In the instant case, however, the Government had no witness at all. Moreover, the refusal of Canas to testify prevented the Government from even seeking an indictment much less trying appellant. Certainly, if just cause for delay exists, as in *Rollins* and *Cuomo,* where prejudice to other prosecutions would result from a premature trial, then surely, good reason existed for the Government's reluctance to indict appellant upon the testimony of a hostile witness. The words of Chief Judge Kaufman in the *Pierro* case (478 F.2d at 389) are particularly apt:

> The Second Circuit Rules Regarding Prompt Disposition of Criminal Cases were not intended to straightjacket the administration of criminal justice in the federal courts, nor were they designed to place obstacles in the path of legitimate law enforcement efforts and thus thwart the compelling public interest in criminal prosecutions. It was never intended that technicalities would carry the day. Some flexibility may be required in individual cases, particularly when the Government demonstrates that is normal practice comports with the letter and spirit of the Rules, that it proceeded in good faith in the case under consideration and that the defendant has suffered no prejudice . . ."

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

May 10, 1974

EDWARD JOHN BOYD, V,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
STEVEN KIMELMAN,
Assistant United States Attorneys,
Of Counsel.

APPENDIX

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Complaint

United States District Court

EASTERN DISTRICT OF NEW YORK

72M 1842

(T. 21, U.S.C., § 963)

UNITED STATES OF AMERICA

—against—

HUMBERTO FLORES, ROLANDO SANCHEZ, a/k/a Conez, and JOHN DOE, a/k/a Fernando Montane,

Defendants.

EASTERN DISTRICT OF NEW YORK, ss.:

JOHN E. DANIOCEK, being duly sworn deposes and says that he is a Special Agent of the Bureau of Customs, duly appointed according to law and acting as such.

On or about the 28th day of September, 1972, within the Eastern District of New York, the defendant Humberto Flores, the defendant Rolando Sanchez, also known as Conez, and the defendant John Doe, also known as Fernando Montane, did conspire to import unlawfully into the United States from Santiago, Chile a quantity of cocaine hydrochloride, a Schedule II narcotic drug controlled substance (Title 21, United States Code, Section 963).

The source of your deponent's information and the grounds for his belief are in part as follows:

(1) On September 28, 1972 at John F. Kennedy International Airport, the defendant Rolando Sanchez was ap-

prehended and found to be in possession of approximately two kilos of a substance field tested as cocaine when the defendant arrived into the United States on Flight No. 491 from Santiago, Chile.

(2) After the discovery of the cocaine in the luggage of the defendant Rolando Sanchez, Special Agents of the Bureau of Customs permitted him to enter the lobby of the International Arrivals Building where he told them he was to make his contact.

(3) When Rolando Sanchez entered the lobby, he approached two individuals who were observed recognizing him. When Rolando Sanchez came within a short distance of these two individuals, they were observed noticing the surveilling agents and afterwoods attempted to avoid Rolando Sanchez and leave the building whereupon they were arrested and tentatively identified as Humberto Flores, and John Doe, also known as Fernando Montane.

WHEREFORE, your deponent respectfully request that the above-named defendant Humberto Flores, the defendant Rolando Sanchez, and the defendant John Doe, that they be dealt with according to law.

JOHN E. DANIOCEK, Special Agent
Bureau of Customs

Sworn to me before this
29th day of September, 1972

/s/ MAX SCHIFFMAN

.....

U.S.M. E.D.N.Y.

Transcript of Minutes, Dated October 12, 1973

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73-CR-602

UNITED STATES OF AMERICA,

Plaintiff,

—against—

HUMBERTO FLORES,

Defendant.

United States Courthouse
Brooklyn, New York
October 12, 1973
10:30 A.M.

Before: HON. MARK A. COSTANTINO,
U.S.D.J.

APPEARANCES:

ROBERT A. MORSE
United States Attorney
Eastern District of New York

By: ROBERT CLAREY
Assistant United States Attorney

ANTHONY GRECO, ESQ.
Attorney for Defendant
563 West Market Street
Long Beach, New York 11561

* * * * *

Transcript of Minutes, Dated October 12, 1973

(3)

The Clerk: United States of America versus Humberto Flores.

(The following took place in the absence of the defendant.)

The Court: Do we need him here on the motion?

Mr. Greco: I don't think so.

Can I proceed?

The Court: No. The defendant must be here. And when the lawyer says it's not necessary, that we can proceed without him—but I would like to have the defendant right now.

Mr. Clarey: Will he be able to understand what is going on here?

Mr. Greco: Yes, I think so.

The Court: What are you afraid of?

Mr. Clarey: I am afraid he doesn't speak English.

Mr. Greco: He speaks English.

Mr. Clarey: We don't want any technicalities.

The Clerk: We have an interpreter downstairs.

The Court: I will talk to him and find out if he speaks English.

(4)

Mr. Clarey: Sometimes he does.

The Court: Can we have second call? I am going to take you as soon as he comes up. We can't proceed until he comes up.

(Recess taken.)

(The following took place in the presence of the defendant.)

The Clerk: United States of America versus Humberto Flores.

Transcript of Minutes, Dated October 12, 1973

The Court: All right, let's hear the argument.

Mr. Greco: May I proceed, your Honor?

If your Honor please, this is a motion pursuant to the Hilbert and Scaffo cases for dismissal of the indictment on the grounds that this matter has been pending against them—for this defendant, Humberto Flores, for over six months in contravention of Rule 4 of the Second Circuit rule regarding prompt disposition of criminal cases and for such other further relief as this court——

The Court: How do you arrive at that?

Mr. Greco: I beg your pardon?

The Court: How do you arrive at that?

(5)

Mr. Greco: Well, I will tell you in a moment. At this moment, if your Honor please, I offer in evidence the complaint in the case against this defendant, Humberto Flores, in Case No. 72 M 1842.

Mr. Clarey: I will stipulate to save time to the dates in my chronology. I am sure Mr. Greco—

The Court: Same dates in your chronology.

Mr. Greco: But I want to establish a record, if your Honor please, for future use.

I also offer in evidence—

The Court: The file establishes the record. There's no problem. It's all filed papers.

Go ahead.

Mr. Greco: I also offer in evidence the dismissal of that particular complaint dated—of No. 72 M 1842 dated February 23rd, 1973.

Now, your Honor will note from the complaint that this defendant was arrested on September 28th, 1972. And your Honor will also note from the dismissal notice—I presume this defendant was released—from any (6) liability under that—pursuant to that complaint on February 23rd, 1973. So that the case pending against him for a period of five months less three days.

Transcript of Minutes, Dated October 12, 1973

Now, upon the very same facts, the very same transaction, this defendant was indicted on June 19, 1973.

Before I proceed further I should mention to the court there was absolutely no application either by the prosecutor or this defendant's then attorney for any continuance or any delay.

Now, as I started to say—to continue, he was—this defendant was indicted on June the 19th, 1973, as I said a moment ago, based on the same facts, except that they added two other parties. But he is the only one here on trial before your Honor. As to the other two, I do not know.

Now, up to the point that I appeared in the—in this matter, which was on September the 17th, 1973, a period of altogether which would be eight months and about three days—

The Court: The complaint and the indictment (7) both.

Mr. Greco: Yes. My point is that as in an adverse possession of real estate the prior period—

The Court: They are not the same. They are not the same thing.

Mr. Greco: Just a moment, if your Honor please. I am making my point. On the—

The Court: You talk about adverse possession. You can take my word for it, the criminal part of the law is—there is no analogy to be drawn between the two.

Mr. Greco: Your Honor—

The Court: Do you want to attack it?

Mr. Greco: Yes.

The Court: You know, I used to be an expert.

Mr. Greco: Otherwise that section is a farce. Suppose—assume in arguendo that the dismissal took place, and, say, for example, six months later he was arrested again on a second complaint, and then five months later it

was dismissed—the complaint was dismissed. That could go on indefinitely. It makes a farce (8) of that particular section. That's my point.

The Court: Tacking on is a—

Mr. Greco: That's my point.

The Court: Absolutely nothing. You can't tack on an indictment.

Mr. Greco: If your Honor please, do you mind if I make my point?

The Court: Go ahead.

Mr. Greco: Your Honor is the one who decides whether I am in error or not.

The Court: I have a right to answer you. Wouldn't it be simple for me to just sit up here and not give you an answer? That's my job. I'm not—I know what I am doing. If I didn't know what I was doing I wouldn't be able to catch on to what you are telling me.

Mr. Greco: In regard to the indictment on June 19, 1973—that indictment is the present indictment number 73 CR 602. And I offer that in evidence also, if your Honor please.

The Court: The file papers are deemed marked in evidence.

Mr. Greco: Yes. Now, that is my point, however.

(9)

The Court: All right. . .

Mr. Greco: That the previous five months less three days, whatever the case was, is or should be considered tacked on to the second period. And I feel that under the circumstances this complaint should be dismissed.

Mr. Clarey: Your Honor, I have made—most of what I would say here in my argument which is attached to my papers. I submit that we are entitled to various exceptions under Rule 5. I submit that it makes no difference whether we have made a motion for a continuance.

Transcript of Minutes, Dated October 12, 1973

And this is set out in Rule 4 under the 50 (b) plan. Rule 4 specifically states that the Rule 5 exception—excuse me—if there appears sufficient grounds for totaling any portion of the six months under one or more of the exceptions in Rule 5, the motion should be denied whether or not the government has previously requested a continuance. And we haven't requested a continuance, but I submit we are entitled to various exceptions under Rule 5 (c) (1) and 5 (d). And I set those out in my papers.

(10)

There is one further thing I would submit, your Honor. And there is an interesting footnote in the United States versus Hilbert—

Mr. Greco: Hilbert.

Mr. Clarey: Hilbert versus Dooling.

The Court: Yes.

Mr. Clarey: Which indicates that—

The Court: That was a little different situation there.

Mr. Clarey: That's correct. It was a different situation. Because that—

The Court: That was an indictment that went past the six months and they reindicted him after the indictment.

Mr. Clarey: It was dismissed under Rule 4.

The Court: I think they said he would be prejudiced.

Mr. Clarey: Dismissed under 48 (b).

The Court: That is altogether different.

Mr. Clarey: Where you don't have enough evidence to indict.

And, in addition, I would submit an offer of proof at this time that this defendant (11) was responsible for the failure to get Canas' testimony, the witness who will testify at the trial.

Mr. Greco: Judge, at the risk of appearing rude—

The Court: There is no—

Transcript of Minutes, Dated October 12, 1976

Mr. Greco: That would require a hearing if he is going to testify. He should be under oath.

Mr. Clarey: Well, if Mr. Greco is going to object, I won't make an offer of proof. If a hearing is necessary—I have Canas downstairs. I can bring him up and he can testify.

Mr. Greco: In that case he has to testify to give his version. Besides that I don't know whether this defendant was at that time represented by counsel. And he was spoken to without the presence of his counsel. And there may be a question of whether it was proper.

Mr. Clarey: That is totally irrelevant to the situation. He was represented by counsel and he also obtained counsel for Canas. And I will be prepared to present that evidence at any time.

(11A)

The Court: If the court feels the evidence is necessary.
Mr. Greco: All right. Thank you.
The Court: Decision reserved.
Mr. Clarey: Thank you, your Honor.
The Court: All right.

* * * * *

Form No. USA-88a-4a
(Rev. 1-29-71)

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 13th day of May 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a copy of the brief and appendix for the appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

William Epstein, Esq.
Federal Defender Services Unit
Legal Aid Society
U. S. Court House
Foley Square
New York, New York

Sworn to before me this
13th day of May 1974

Sylvia E. Morris

SYLVIA E. MORRIS
Notary Public, State of New York
No. 24-4503881
Qualified in Kings County
Commission Expires March 30, 19 75

Deborah J. Amundsen
DEBORAH J. AMUNDSEN

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:

_____

_____

_____

Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____ duly entered herein on the ____ day of _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,
Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:

_____

_____

_____

Attorney for _____

_____ Action No. _____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____
United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____ is hereby admitted.
Dated: _____, 19____

_____
Attorney for _____

FPI-LC-5M-6-73-7355